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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 558

JAMES M. PENNINGTON, ET AL,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

PETITION FOR A REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 58 of the Court, Petitioners James M. Pennington, et al., respectfully pray that the Court rehear and grant their petition for a writ of certiorari, which writ was denied by the Court by order of December 9, 1968. Mr. Justice Black favored granting the writ. Mr. Justice Fortas did not participate. Petitioners respectfully assign the following new or intervening substantial matters:

1. IN THESE CIRCUMSTANCES DENIAL OF THE WRIT IS A DENIAL OF DUE PROCESS: WHEN THIS COURT HAS ASSUMED JURISDICTION TO LAY DOWN

RULES TO GOVERN A SECOND TRIAL OF A CASE, AND IN RELIANCE THEREON UNDISPUTABLE EVIDENCE CONSISTENT WITH THOSE RULES HAS BEEN INTRODUCED, IT IS A DENIAL OF FUNDAMENTAL FAIRNESS FOR THE COURT TO REFUSE TO REVIEW THE SUBSTITUTION OF AN INCONSISTENT AND DIFFERENT RULE BY THE TRIAL COURT. IF THIS COURT WAS WRONG IN THE RULE IT LAID DOWN FOR THE SECOND TRIAL, PETITIONERS SHOULD BE GIVEN ANOTHER TRIAL UNDER THE RIGHT RULE.

The combined opinions of Mr. Justice White and Mr. Justice Douglas, carrying the votes of six members of this Court, plainly established that the heart of successful proof, in this case, proof that must necessarily be sufficient without regard to predatory intent, would be a combination of these elements—(1) a union-business agreement that strait-jacketed the union in its bargaining policy, and (2) proof of anti-competitive effects of the national contracts. We submit that these elements (at least when combined) establish a correct reconciliation of anti-trust and labor laws and when they appear should govern such cases as this.

In reliance upon the ruling of this Court, petitioners submitted proof at the second trial that indisputably satisfied both these elements. The strait-jacket agreement, the Protective Wage Clause, is quoted in the schedule at the end of our petition for certiorari. This was the result of a "quid pro quo" between the union and the dominant coal association, BCOA (2143a, 2185a-6a). Also there was statistical proof that the whole combined industry throughout the country was operating at losses under the national contracts if the two dominant companies were removed from the statistics (to say nothing of the effects in Tennessee). These facts are indisputable.

The prior opinion of Mr. Justice White (joined by the Chief Justice and Justice Brennan) ruled that a strait-jacket agreement restricting the union's bargaining policy violated antitrust policy "without regard to predatory intention or effect" (381 U.S. 688). The prior opinion of Mr. Justice Douglas (joined by Justices Black and Clark) ruled that proof of an industry-wide collective bargaining agreement that forced some employers out of business "is prima facie evidence of a violation . . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act" (381 U.S. 672-3).

Thus this Court plainly told petitioners that predatory intent to drive small coal operators out of business was not a specific element that had to be proved and it is even more clear that it did not have to be proved by Norris-LaGuardia's "clear proof" since this case could only deal with "authorized" national contracts.

But after the proof was concluded and submitted to the Trial Judge, he filed a memorandum holding that the opinions of this Court (which were to control the second trial under the order of this Court) were mutually inconsistent, and he established the rule that petitioners must necessarily prove "predatory intent to drive small coal operators out of business" with proof (apparently direct evidence) so strong as to satisfy the "clear proof" rule of Norris-LaGuardia (257 F. Supp. 829). It made no difference to the Trial Court that the national contracts over the period of a decade were clearly authorized by the union. He further ruled that the meaning of this Court's opinions was that the Sherman Act was "not de-

signed to protect marginal operators" (257 F. Supp. 829). These views were wrong and fly in the face of all established concepts of the Sherman Act and of the Constitution itself. But most importantly, for the purposes of this petition, we say that this was a switching of the rules after our proof was submitted under a different set of rules established by this Court.

It is submitted that a continuance of this Court's denial of the writ of certiorari will work fundamental unfairness upon these petitioners such as to deprive them of any fair chance in a second trial and therefore constitutes a deprivement of due process. If this Court was wrong in its prior decision, petitioners should have the right to go to trial and submit proof under the right rule. The fact that there is proof upon which they could win is shown by the fact that they won a jury verdict on the first trial.

We respectfully ask the Court to consider that these petitioners (though they be "marginal" and apparently so insignificant in the industry as to have no rights under the Sherman Act according to the Trial Court) have fought this case for eleven years. They have had judgments of over a half million dollars entered against them by reason of contracts forced upon them. The costs adjudged against them after the first trial and appeals were in excess of $8,000 to say nothing of their own costs, and if the Court continues to deny the writ, these costs will now be repeated again. Manifestly, justice received on the second trial and appeal has not been worth the price, and this record constitutes a sad footnote in the annals of the so-called "favored" private Sherman Act case.

2. THE NATIONAL CONTRACTING POLICIES CONTINUE: THE STRAIT-JACKET THAT EMBRACES THE UNION WHICH DOMINATES THE APPALACHIAN REGION

CONTINUES TO DEPRIVE THAT REGION OF PEACE AND ANY FAIR CHANCE TO RESTORE VITALITY IN ITS ECONOMY. THE DEAD HAND OF THIS KIND OF COMBINATION WILL INEVITABLY SPREAD TO OTHER INDUSTRIES AND OTHER REGIONS.

Since the period involved in this case, the UMW and BCOA have negotiated national contract amendments in 1964, 1966 and 1968, each time making substantial, flat, blanket increases across the board, the 1968 increase being several times the size of any previous increase.

In the meantime the UMW and BCOA, side by side, are continuing their apparently successful campaign to beat off efforts at challenge of the Protective Wage Clause and later "Eighty Cent" Welfare Clause under the Labor Law. We are advised (but cannot state as a fact) the Labor Board has withheld final action pending this Court's decision in this case. See *Lewis v. NLRB*, 350 F. 2d 801.

The ruling that the Protective Wage Clause will be allowed to dominate the coal industry in perpetuity will have serious implications throughout the industry, particularly in the Appalachians. Such a rule by oligopoly over an industry with such diversity of size, resources and varying methods of production and geological circumstances, has had serious and broad effects already, and such effects will multiply if the resistance to such rule in the Labor Board case, and more importantly in this case, is defeated. It is only in this antitrust case that the issues involved can be met in full perspective.

In the meantime the pattern of violence that is reflected in the District Court's opinion in this case, and in numerous other records, goes on. Since the filing of the petition for certiorari there have occurred in October and

December two instances of dynamitings of mining equipment in the vicinity of the operations of the two petitioners who remain in business, each with consequent losses in excess of $500,000. We do not say that UMW authorized such instances, but we do say that there is inevitable conflict, turmoil and unrest if employers and employees or their representatives in their own units and circumstances cannot sit down and engage in bona fide bargaining as contemplated in the Labor Law. That is the express reason for the Labor Law. Such instances of destruction almost always happen to companies who have failed or refused to sign the impossible but one and only union contract whose terms cannot be changed. There is small wonder that the area, with such a long history of turmoil, is shunned by new industry and that coal remains the only hope of survival. But what kind of hope is that for the Appalachian region under an oligopoly like this?

It is a soulless, faceless rule that has long demonstrated no feeling for the interests of union members in the forced elimination of three-fourths of them from jobs. Protests against the contract of the men at their conventions is part of the record now before the Court (PP 829a-836a) including this complaint (P 833a):

> "According to Mr. Kennedy when he was commenting on the contract, he stated he thought the increases in wages were the best for the economic condition. I wonder whether that is so; whether a shorter week would be better. We work in the mines in my district, jump on a belt line and ride maybe a thousand or two thousand feet, put a respirator on and go up to the face and work. When we grab a drink of water or a bite to eat, there is a man standing behind us with a stop watch. We work a machine and try to keep up with that machine. I wonder which wears out first, the man or machine."

This statement was made in 1956, but identical language is expressed in several reported interviews made since public attention has recently been sharply called to the question of mine safety. It is unreasonable to expect real human concern from an oligopoly devoted to selfish interests.

Clearly from labor articles, men in positions of leadership in labor and management in other industries are interested in the fate of coal's Protective Wage Clause. It is a device where big business and big labor can work with profit in ease and happy harmony, to the discomfort of everyone else in the industry and ultimately of the public.

Reflection will convince that these expressions are not overstatements of the consequences of this Court's order denying the writ. The fat will really be in the fire in our economic order if this type of oligopoly is turned loose. Realizing that the Court is simply too busy to consider all truly serious matters brought before it, still we respectfully suggest that the Joint Economic Committee of Congress has not been wrong all these years in its annual complaint that the main trouble in the economic system is the failure of the executive and judicial branches to apply and enforce the antitrust law and preserve *real* competition, saying that the stage has long since been reached when all government policies must not frustrate, but must be made to conform to this purpose if our free enterprise system is to survive. The denial of the writ is a mighty blow in the directly opposite direction.

Respectfully submitted,

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Attorney for Petitioners.

CERTIFICATE

This is to certify that the undersigned, John A. Rowntree, a member of the bar of this Honorable Court, is attorney for petitioners in the foregoing petition and that the same is presented in good faith and not for delay, and that the petition is restricted to intervening circumstances of substantial and controlling effect or to other substantial grounds not previously presented.

John A. Rowntree

JOHN A. ROWNTREE, Attorney